

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

A.J. MYERS AND SONS, INC.,

Case No. 06-CA-119505

and

AMALGAMATED TRANSIT UNION, LOCAL 1738,
AFL-CIO, CLC

**RESPONDENT A.J. MYERS AND SONS, INC.'S REPLY BRIEF IN SUPPORT OF
EXCEPTIONS TO THE OCTOBER 3, 2014 DECISION OF ALJ DAVID I. GOLDMAN**

Filed on Behalf of A.J. Myers and Sons, Inc.

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Dated: November 25, 2014

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Respondent A.J. Myers and Sons, Inc. ("A.J. Myers"), through its attorneys, files this Reply Brief in Support of its Exceptions to the October 3, 2014, Decision (the "Decision") of ALJ David I. Goldman (the "ALJ") in which the ALJ found that A.J. Myers violated Sections 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to recognize and bargain with Petitioner Amalgamated Transit Union Local 1738, AFL-CIO, CLC (the "Union").

**I. THE DEARTH OF EVIDENCE THAT A.J. MYERS HIRED OPERATORS WHO
DROVE FOR LATROBE PRECLUDES A "SUCCESSOR" FINDING**

In arguing that the ALJ correctly found A.J. Myers is a "successor" employer to First Student Inc. ("First Student"), the General Counsel stretches the transcript to cite evidence where there is none, and makes legal claims without citation to excuse its failure to present evidence necessary to support its successor claim. The General Counsel's response does not address the defects in the ALJ's decision, and the Board should dismiss the complaint.

A.J. Myers' exceptions to the "successor" finding are straightforward. Considering the totality of the circumstances, there is not substantial evidence to support the ALJ's finding that there was a "substantial continuity" in First Student's "employing enterprise" simply because A.J. Myers now services the public school portion of the Latrobe School District contract. Specifically, A.J. Myers only took over a portion of a single contract held by First Student, and

the General Counsel did not present evidence that any of the former First Student drivers that A.J. Myers hired actually drove for Latrobe when employed by First Student. This is not a single-contract, single-location successor issue that is the subject of so many successor cases, and the particular facts of this case distinguish it from the one size fits all analysis the ALJ and the General Counsel want to impose on this dispute.

Citing one line of testimony, the General Counsel argues “there is substantial record evidence” that the drivers that A.J. Myers hired to service the Latrobe School District contract “*actually drove* for the Latrobe School District while working for the predecessor First Student.” (Opp. Brf. at 8) (emphasis added). A.J. Myers made no such broad “admission” as the General Counsel now claims (*id.* at 7). On cross examination, William Myers simply agreed that Latrobe School District requested that A.J. Myers “put the same drivers on the same routes where possible,” and that A.J. Myers complied with that request “to the extent that [it] could.” (Tr. at 92.) That vague statement is the only testimony the General Counsel cites as evidence that any of the 51 drivers that A.J. Myers hired previously drove for Latrobe School District.

This testimony proves nothing. When directly questioned on the issue, Mr. Myers testified he had no knowledge of what percentage of the drivers that A.J. Myers hired actually drove for Latrobe the prior year. (Tr. at 146.) The Union certainly had this information available to it, yet offered absolutely no evidence on the issue. The General Counsel’s brief does not even address its own witnesses’ testimony that acknowledged that First Student drivers at the Latrobe terminal drove for Greensburg-Salem, Jeannette, Greensburg Central Catholic, Seton Hill University, five-to eight special needs programs, an Intermediary Unit (IU), Ligonier Valley, the “ARC,” other “little ones here and there” *in addition to* driving for Latrobe, or the fact that First Student changed drivers routes every year based on seniority and commonly bumped drivers off

of their routes. (*See* Resp. Brf. at 3-4). Far from “substantial,” there in fact was no evidence that any of the First Student drivers that A.J. Myers hired actually drove for Latrobe School District.

Because it has no evidence to support its factual assertion, the General Counsel argues that “whether a particular predecessor employee hired by [A.J. Myers] was the same employee assigned by the predecessor to service that particular customer is not relevant.” (Opp. Brf. at 8). Of course it is relevant. General Counsel does not cite any legal authority to support this remarkable statement, nor could it. In a successor analysis, the Board considers from the employees’ perspective whether there is “substantial continuity” between operations, which includes consideration of whether the employee is serving the same body of customers under the same working conditions. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 107 S.Ct. 2225 (1987). The only reason the Union can even claim that A.J. Myers is a “successor” to First Student in the first place is because A.J. Myers took over the Latrobe contract from First Student. If the drivers that A.J. Myers hired did not drive for Latrobe, there cannot possibly be any continuity of operations between employers for these employees.

The General Counsel does not cite any cases outside of *Burns* and *Fall River Dying* to support its position, and does not offer any response whatsoever to A.J. Myers’ distinguishing the successor cases that the ALJ relied on in finding A.J. Myers was a *Burns* successor. (*See* Resp. Brf. at 15-16.) In all of those cases, there was either a single-location, single contract unit or evidence to support a finding that the employees actually worked at the location where the successor now operated. With no such evidence present here, this case is more analogous to *Lincoln Private Police, as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717 (1971), and *Nova Services Co.*, 213 NLRB 95, 1974 WL 5371 (1974), where there were multi-contract, multi-location bargaining units that weighed against a successor finding. The facts matter, and

there simply is no evidence to support the ALJ's finding that there was substantial continuity between operations for the First Student drivers that A.J. Myers hired.

II. GENERAL COUNSEL'S BLANKET DEFERRAL TO THE ALJ DOES NOT SUPPORT A FINDING THAT LATROBE IS AN APPROPRIATE UNIT

On the second issue of whether A.J. Myers' Latrobe terminal is an appropriate bargaining unit outside of its five other terminals, the General Counsel simply echoes the ALJ's findings and argues there is sufficient evidence to support his conclusions. The General Counsel does not address A.J. Myers' arguments or supporting case law, but simply cites to the Decision itself in contending that the ALJ "properly found that the Latrobe unit was an appropriate unit." (Brf. at 15). Presented with no real arguments to reply to, A.J. Myers incorporates the evidence and arguments raised in its principle brief as support for its claim that the ALJ erred in finding that the Latrobe terminal is an appropriate bargaining unit.

CONCLUSION

For the reasons set forth above, A.J. Myers and Sons, Inc. respectfully submits that the Board reverse the ALJ's findings and dismiss the Complaint.

Date: November 25, 2014

Respectfully submitted,

METZ LEWIS BRODMAN MUST O'KEEFE LLC

By


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief In Support of Exceptions to the October 3, 2014 Decision of ALJ David I. Goldman was served on November 25, 2014, by United States mail, first class postage prepaid, at Pittsburgh, Pennsylvania:

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